91-1669

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

CHILDREN AND YOUTH SERVICES OF DELAWARE COUNTY, H. SCOTT CAMPBELL, SANDRA CORNELIUS, COUNTY OF DELAWARE and JOHN F. WHITE, JR.,

Cross-Petitioners

v.

SAMUEL WINSTON, JR., a minor by his parents, MARYANN AND SAMUEL WINSTON, SR. and MARYANN WINSTON and SAMUEL WINSTON, SR.,

Cross-Respondents

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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County, H. Scott Campbell, Sandra
Cornelius, County of Delaware

April 3, 1992

QUESTIONS PRESENTED FOR REVIEW

1. Whether a family's action challenging the constitutionality of a child welfare agency's visitation policy satisfies Article III of the Constitution, which requires an actual "case or controversy," if the child is no longer in the agency's custody?

2. Whether the doctrine of Younger v. Harris, 401 U.S. 37 (1971), mandates abstention by the federal court due to preceding and ongoing state court actions?

LIST OF PARTIES

The parties to the proceedings below were Cross-Petitioners and Respondents Children and Youth Services of Delaware County, H. Scott Campbell, Sandra Cornelius, County of Delaware and John F. White, Jr., Secretary, Department of Public Welfare, Commonwealth of Pennsylvania, and Petitioners and Cross-Respondents Samuel Winston, Jr., a minor by his parents, Maryann and Samuel Winston, Sr. and Maryann Winston and Samuel Winston, Sr.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW ix

STATEMENT OF JURISDICTION xi

CONSTITUTIONAL AND STATUTORY PROVISIONS . xi

STATEMENT OF THE CASE xv

REASONS FOR GRANTING THE WRIT xx

I. ARTICLE III's "CASE OR CONTROVERSY" REQUIREMENT AS APPLIED TO PETITIONERS' CASE REQUIRES THAT PETITIONERS' CASE BE DISMISSED. 1

A. The Return of Samuel Winston, Jr. to the Physical and Legal Custody of his Father Rendered the Claims for Injunctive and Declaratory Relief Moot. 2

1. Petitioners have not presented a case in which the challenged harm is too short in duration to be litigated to conclusion during its pendency. . . . 5

2. The likelihood of repetition of the

circumstances giving rise to CYS taking custody of Samuel Jr. are remote, speculative and not foreseeable as being repeated. 9

B. Petitioners' Claims For Injunctive And Declaratory Relief Should Have Been Dismissed. 13

II. PURSUANT TO THE YOUNGER DOCTRINE, THE DISTRICT COURT SHOULD HAVE ABSTAINED FROM HEARING PETITIONERS' CLAIMS. 13

A. Adjudicatory and Review Hearing Pursuant to the Pennsylvania Juvenile Act Constitute "Ongoing Judicial Proceedings." 15

B. Regulating the Care, Custody and Control of Children Properly Adjudicated Dependent and Placed in Foster Care is an Important State Interest. 20

C. The Delaware County Juvenile Court Provided an Appropriate Forum to Adequately Address the Alleged Violation of Federal Rights. 23

D. The Lower Court Erred in Holding that Cross-petitioners Waived their Right to Assert Abstention. 25

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Brunken v. Lance,
807 F.2d 1325 (7th Cir. 1986) 22

Christopher B. v. Barry,
715 F. Supp. 1143 (D.D.C. 1989) . . . 23

City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 10

Clarendon Ltd. v. Nu-West Indus., Inc.,
936 F.2d 127 (3d Cir. 1991) 1

Defunis v. Odegaard,
416 U.S. 312 (1974) 7, 8

DeSpain v. Johnston, 731 F.2d 1171
(5th Cir. 1984) 22, 25

Donker v. City of NY Human
Resources Admin., 673 F. Supp.
1221 (S.D.N.Y. 1987) 23

Fay v. South Colonie Central School
Dist., 802 F.2d 21 (2d Cir. 1986) . . 22

Honig v. Doe,
484 U.S. 305 (1988) 1, 2, 5, 13

Huffman v. Pursue, Ltd.,
420 U.S. 592 (1975) 20

In Re Black, 273 Pa. Super. 536,
417 A.2d 1178 (1980) 16

In Re Burrus, 136 U.S. 586 (1890) . . 21

Juidice v. Vail,
430 U.S. 327 (1977) 25

Malachowski v. City of Keene,
787 F.2d 704 (1st Cir.),
cert. denied, 479 U.S. 828 (1986) . . 22

McCreary Tire & Rubber Co. v.
CEAT S.P.A., 501 F.2d 1032
(3d Cir. 1974) 27

Monroe v. Pape,
365 U.S. 167 (1961) 13

Moore v. Sims,
442 U.S. 415 (1979) . 14, 15, 17-21, 24,
25, 28

Murphy v. Hunt,
445 U.S. 478 (1982) 2, 3, 10, 22

P. Edward A. by and through
Nolan v. Williams, 696 F. Supp.
1432 (D.Utah 1988) 23

Pennzoil Co. v. Texaco Inc.,
481 U.S. 1 (1987) 24

Peterson v. Babbitt, 708 F.2d 465
(9th Cir. 1983) 22

Preiser v. Newkirk,
422 U.S. 395 (1978) 11

Railroad Comm'n v. Pullman Co.,
312 U.S. 496 (1941) 17

Rhoads v. Ford Motor Co., 514 F.2d 931 (3d
Cir. 1975) 27

Roe v. Wade, 410 U.S. 113 (1973) . . . 7

Schall v. Martin,
467 U.S. 253 (1984) 6, 7

Scott v. Univ. of Delaware,
601 F.2d 76 (3d Cir. 1979) 27

Steffel v. Thompson,
415 U.S. 452 (1974) 16, 18, 23

Texaco v. Pennzoil Co.,
784 F.2d 1133 (2d Cir. 1986) 24

Trainor v. Hernandez,
431 U.S. 434 (1977) 19, 23

United States Parole Comm'n
v. Geraghty, 445 U.S. 388, (1980) . . . 2

United States v. American Ry.
Express Co., 265 U.S. 225 (1924) . . 26

United States v. Munsingwear,
340 U.S. 36 (1950) 1, 13

Williams v. Carros, 576 F. Supp. 545
(W.D. Pa. 1983) 23

Younger v. Harris,
401 U.S. 37 (1971) . . i, xix, 14-16, 20

STATUTES

28 U.S.C. § 1254(1) xi

28 U.S.C. § 1343(a) xvi

42 Pa. Cons. Stat. Ann. § 6351 . xii, 16

42 Pa. Cons. Stat. Ann.
Section 6301, et. seq. xv

42 U.S.C. § 1983 . . . . . xii, xvi, 13

CONSTITUTIONAL PROVISIONS

Article III of the United States
Constitution . . . . . passim

TEXTS

Charles A. Wright, Arthur R. Miller,
Edward H. Cooper, Federal Practice
and Procedure § 3904 (1992). 27

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is set forth in its entirety in the appendix of the Petition for Writ of Certiorari (the "Appendix") at page 1a.

The Opinion of the United States District Court for the Eastern District

of Pennsylvania is reported at 748 F. Supp. 1128 (E.D. Pa. 1990) and is set forth in full in the Appendix at page 54a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 7, 1991. Petitioners' petition for rehearing was denied by the United States Court of Appeals on December 3, 1991. Petitioners filed their Petition for Writ of Certiorari dated February 28, 1992. This Petition was received by Respondents on March 5, 1992. Pursuant to Supreme Court Rule 12.3, Respondents file this Cross-petition.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. United States Constitution, Article III, which provides:

Section 2. [1] The judicial Power shall extend to all Cases in Law and Equity, arising under this

Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

2. 42 U.S.C. § 1983, which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. 42 Pa. Cons. Stat. Ann. § 6351(a), (e) and (f), which provide:

6351. Disposition of dependent child

(a) **General rule.**--If the child is found to be a dependent child the court may make any of the following orders of disposition best suited to the protection and physical, mental, and moral welfare of the child;

. . .

(e) **Disposition review hearings.**--Within six months of the removal of a child from the home of his parents, guardian or custodian for placement pursuant to a transfer of temporary legal custody or other disposition under subsection (a)(2), the court shall conduct a disposition review hearing for the purpose of determining whether placement continues to be best suited to the protection and physical, mental and moral welfare of the child. The court shall conduct a second review hearing not later than six months after the initial hearing, a third hearing not later than six months after the second hearing and subsequent disposition review hearings at least every 12 months until the child is returned home or removed from the jurisdiction of the court.

(f) At each disposition review hearing, the court shall:

(1) determine the continuing necessity for and appropriateness of the placement;

(2) determine the extent of compliance with the service plan developed for the child;

(3) determine the extent of progress made toward alleviating the circumstances which necessitated the original placement;

(4) determine the appropriateness and feasibility of the current placement goal for the child; and

(5) project a likely date by which the goal for the child might be achieved.

. . .

STATEMENT OF THE CASE

This case presents important issues regarding whether a family who no longer has a child in the custody of a child welfare agency maintains a legal basis for an action challenging the Constitutionality of the agency's visitation policy and, if so, whether a federal court should abstain from exercising jurisdiction over such a claim when it could be raised in an action pending in state court.

On June 21, 1989, the Samuel Winston, Jr. was taken into the protective custody of Children and Youth Services of Delaware County ("CYS"). A right to detain hearing was held on June 28, 1989. On July 11, 1989, pursuant to the Pennsylvania Juvenile Act, 42 Pa. Cons. Stat. Ann. Section 6301, et. seq.

(Purdon 1982 & Supp. 1991), a hearing was held wherein the minor was adjudicated dependent and placed in the legal and physical custody of CYS.

On August 23, 1989, Petitioners filed a Complaint in the Eastern District Court of Pennsylvania alleging that the CYS' visitation policy and the Department of Public Welfare of Pennsylvania ("DPW") regulation governing that policy was unconstitutional. Petitioners sought declaratory and injunctive relief under 42 U.S.C. § 1983 and invoked federal jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) and (4). During the pendency of this federal action, the state court held review hearings on October 18, 1989, December 19, 1989 (minor returned to the custody of his father), March 21, 1990, October 16, 1990 and March 12, 1991. On

December 3, 1991, both the adjudication of dependency and Juvenile Court Supervision were terminated, with legal custody of Samuel Jr. to remain with his parents Samuel Sr., and Maryann Winston, and physical custody of Samuel Jr. to remain with his father, Samuel Sr.

In their Answer to Petitioners' Complaint, the county defendants raised abstention and mootness as affirmative defenses. Later, county defendants filed a Motion to Dismiss in which they suggested that the returning of physical custody of Samuel Winston, Jr. to his father effective December 20, 1989, rendered moot Petitioners' claim challenging the constitutionality of CYS' visitation policy. A pretrial hearing was held on April 27, 1990. The trial court rejected these defenses, denied

this motion and agreed to hear the constitutional challenge.

By Order and Memorandum entered on September 25, 1990, the District Court ruled in favor of Defendants on all of Petitioners' constitutional claims.

On October 24, 1990, Petitioners filed an appeal to the United States Court of Appeals for the Third Circuit. Pursuant to a request by the Third Circuit, all parties filed briefs on (i) what effect CYS' return of the minor to the custody of his father had on the constitutional challenge, and (ii) the applicability to this case of the doctrine of abstention. On November 7, 1991, the Court of Appeals, while affirming the District Court decision on the merits, held appellants' claim "capable of repetition yet evading

review," and therefore excepted from the mootness doctrine. Further, the Third Circuit held abstention by the federal court was inappropriate due to appellees' failure to preserve such a claim. Specifically, the court held that by neither appealing from the district court's failure to abstain nor cross-appealing when appellants appealed from the district court's adverse judgement, appellees' waived their claim of abstention.

On November 21, 1991, Petitioners petitioned for a panel rehearing. This petition was denied by the Court of Appeals on December 3, 1991.

REASONS FOR GRANTING THE WRIT

This cross-petition for writ of certiorari raises important issues regarding i) Article III's limitation on federal court jurisdiction to actual "cases or controversies," and ii) the doctrine of abstention as established by this Court. Petitioners' federal lawsuit should have been dismissed as moot by the district court; the minor child was returned to his father's custody shortly after the federal claim was filed. Thus, no visitation issues remained as between Petitioners and CYS. Nor does Petitioners' claim satisfy the "capable or repetition yet evading review" exception. However, even if Petitioners' case was not rendered moot by the return of custody to the minor's father, or if it is excepted from the mootness

doctrine, the lower court should have abstained from hearing Petitioners' case under the Younger doctrine of abstention.

Cross-petitioners request this Court grant the instant writ in order to uphold the Constitutional requirement of an actual case or controversy before an adjudication on the merits by a federal court. Further, Cross-petitioners' request this Court grant this writ to apply to the instant case the principles it has established regarding federal court abstention from cases in which there are ongoing state court proceedings, in which the state proceeding implicates important state interests and in which the state proceedings afford an adequate opportunity to raise federal claims.

I. ARTICLE III's "CASE OR CONTROVERSY" REQUIREMENT AS APPLIED TO PETITIONERS' CASE REQUIRES THAT PETITIONERS' CASE BE DISMISSED.

Cross-petitioners request this Court to apply Article III's limitation on federal court jurisdiction to an "actual case or controversy" to the present case. The Third Circuit erroneously applied the "capable of repetition yet evading review" exception to the mootness doctrine. See Honig v. Doe, 484 U.S. 305 (1988). Cross-petitioners assert that the circuit court should not have addressed the merits of Petitioners' claim, but should have found Petitioners' claim moot, and reversed or vacated the judgment below and remanded with a direction to dismiss. See United States v. Munsingwear, 340 U.S. 36 (1950); Clarendon Ltd. v. Nu-West Indus., Inc., 936 F.2d 127 (3d Cir. 1991).

A. The Return of Samuel Winston, Jr. to the Physical and Legal Custody of his Father Rendered the Claims for Injunctive and Declaratory Relief Moot.

Under Article III of the Constitution, federal courts cannot adjudicate an issue unless it is presented with an actual "case or controversy." United States Parole Comm'n v. Geraghty, 445 U.S. 388, 395-396 (1980). See also Honig v. Doe, 484 U.S. 305 (1988). In general, a case becomes moot and therefore non-justiciable as lacking a "case or controversy," when the issues presented are no longer "live" or the parties lack "a legal cognizable interest in the outcome." Murphy v. Hunt, 445 U.S. 478, 482 (1982). In the present action, the only issue between Petitioners and Respondents concerns visitation practices in connection with

the individual child in care. This child is no longer in care and has not been in agency care since December 20, 1989. The issue asserted by Petitioners was rendered moot by the return of the minor child to the custody of his father.

There is an exception to the general mootness rule for cases that are "capable of repetition yet evading review." Murphy, 455 U.S. at 482. As stated by the Court in that case:

> In the absence of a class action, the "capable of repetition, yet evading review" doctrine [is] limited to the situation where two elements combine:
>
> (1) The challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and
>
> (2) There was a reasonable expectation that the same complaining party would be subjected to the same action.

Id. (citations omitted).

The Third Circuit erroneously applied this exception and held "that although the need for an injunction on behalf of the Winstons is no longer live, their request for declaratory relief remains viable and the appeal [is] not moot merely because Samuel Jr. has been returned to the physical custody of his father." Appendix at 10a. The court found that there was a "reasonable probability" that Petitioners could again face the restrictions on visitation that are the subject of the suit, and that in temporary custody cases, there is no assurance that evasion of review will not occur time and time again. See id. The circuit court misapplied this Court's two-pronged analysis.

1. Petitioners have not presented a case in which the challenged harm is too short in duration to be litigated to conclusion during its pendency.

In the case at bar, the minor was removed from his parents' custody on June 21, 1989 and returned to the custody of his father on December 20, 1989. In this case, the challenged harm may in fact have been too short in duration to be litigated to conclusion during the pendency. However, regarding the claims raised in the case sub judice, all possible claimants are not equally time constrained. There are other children in long-term foster care whose placement is of significant duration to defeat the "yet evading review" prong of the Honig exception. Accordingly, there exist other proper party plaintiffs who could maintain a live case or controversy for a

period of time sufficient for appellate review.

A review of some of this Court's decisions reflects that typically, cases that "evade review" are ones in which all possible petitioners are equally time constrained. For example, Schall v. Martin, 467 U.S. 253 (1984), was a habeas corpus class action which was certified on behalf of juveniles subjected to pretrial detention. This detention typically ran about two weeks for every possible member of the class. This Court noted that the release of the representative plaintiff did not moot the action. The individual plaintiff might suffer repeated deprivations and it was certain that others similarly situated would be detained under the same procedures for the same periods of time.

See Schall, 467 U.S. at 262, 280. Therefore, the claim was one which would "evade review."

Roe v. Wade, 410 U.S. 113 (1973), also exemplifies the application of the "evading review" prong of the exception. All women with unwanted pregnancies who wished to press a constitutional claim were confronted with the same basis "mootness" fact, i.e., 270 days of gestation. Therefore, all possible plaintiffs were confronted with the same time period that would preclude claim review.

Defunis v. Odegaard, 416 U.S. 312 (1974), is particularly instructive regarding this Court's application of the "yet evading review" prong of the exception. Defunis, after being denied admission to a state-operated law school

to which he had applied, alleged that the school's admission procedures and criteria were unconstitutional. In holding the case moot and not "of the type to which the capable of repetition, yet evading review" exception applies, this Court stated:

> [J]ust because this particular case did not reach the Court until the eve of the petitioner's graduation from Law School, it hardly follows that the issue he raises will in the future evade review. If the admission procedures remain unchanged, there is no reason to suppose that a subsequent case attacking those procedures will not come up with relative speed to this Court. . .

Defunis, 416 U.S. at 319.

Similarly, in the instant case, Petitioner noted that CYS' visitation policy affects, at any given time, 175-200 children in Delaware County, or approximately 35-40% of the children in

CYS out-of-home placements. Should another family find CYS's visitation policy objectionable, that family will have ample opportunity to litigate a claim challenging the policy.

2. The likelihood of repetition of the circumstances giving rise to CYS taking custody of Samuel Jr. are remote, speculative and not foreseeable as being repeated.

The circuit court found the Winston's case to be "capable of repetition, . . . [g]iven the nature of the parental conduct that necessitated placement of Samuel Jr. in the protective custody of CYS." Appendix at 8a. The court was referring to Mrs. Winston's "history of continued abuse of alcohol and drugs," and Mr. Winston's "apparent recent stability" after his arrest for drug possession. Id.

Engaging in such speculation is inconsistent with this Court's decisions on this issue. As this Court stated in Murphy:

> This Court has never held that a mere physical possibility was sufficient to satisfy [the capable of repetition prong]. If this were true, virtually any matter of short duration would be reviewable. Rather, we have said that there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party.

Murphy, 455 U.S. at 482.

Furthermore, "the capable of repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983).

In Preiser v. Newkirk, 422 U.S. 395 (1978), this Court addressed the issue of mootness and "the reasonable expectation" of a wrong being repeated. See Preiser v. Newkirk, 422 U.S. 395 (1978). In that case, Newkirk, who had been incarcerated in a medium security prison and then transferred to a maximum security prison without explanation or a hearing, claimed that the transfer violated the Constitution. Prior to the District Court's ruling, Newkirk was returned to the medium security prison. This Court, ordering Newkirk's action be dismissed as moot, characterized Newkirk's subjective fear of re-transfer as remote and speculative. See id. at 403.

Similarly, the present record presents no suggestion that Mr. Winston will again be arrested and unable to

provide custodial care for his son. Furthermore, Mr. Winston's concern about a repeated loss of custody was based, at least in part, on CYS' ongoing involvement with the family even after Samuel Jr. had been returned to his father. See Appendix at 8a. This concern is unfounded; as previously noted, CYS terminated its adjudication of dependency and terminated court supervision as of December 3, 1991.

Cross-petitioners request this Court to grant this writ to rectify the error of the court below in its application of the "capable of repetition, yet evading review" exception to the mootness doctrine. Neither this Court, nor the courts below, have the authority, under the Constitution, to adjudicate a case absent an actual, ongoing controversy.

See U.S. Const. Art. III, § 2, cl. 2; Honig, 484 U.S. at 317.

B. Petitioners' Claims For Injunctive And Declaratory Relief Should Have Been Dismissed.

Where a case has become moot while on appeal, the proper course is to vacate the district court's judgment and remand with directions to dismiss. Honig, 484 U.S at 329 (Rehnquist, C.J., concurring (collecting cases)); United States v. Munsingwear Inc., 340 U.S. 36 (1950).

II. PURSUANT TO THE YOUNGER DOCTRINE, THE DISTRICT COURT SHOULD HAVE ABSTAINED FROM HEARING PETITIONERS' CLAIMS.

The law is well-settled that a plaintiff is free to bring a Section 1983 suit in federal court without any requirement that he first exhaust state judicial remedies. Monroe v. Pape, 365

U.S. 167, 183 (1961). Younger v. Harris, 401 U.S. 37 (1971), and its progeny, most especially in this context, Moore v. Sims, 442 U.S. 415 (1979), interpose an exhaustion requirement when (1) a state proceeding is pending at the time of the filing of the federal suit; (2) an important state interest is involved in the litigation; and (3) there is adequate opportunity in the state proceeding to raise the federal constitutional and statutory claims. See Moore v. Sims, 442 U.S. 415 (1979).

In Moore v. Sims, this Court held that a federal court's exercise of jurisdiction over an action challenging the constitutionality of a state's child protection law was improper since there was a pending state custody proceeding. See Moore, 442 U.S. 415. According to

the Court, Younger reflects a strong policy against federal intervention in state court proceedings in the absence of great, immediate and irreparable harm to the federal plaintiff. See id. at 432. The only pertinent inquiry, is whether the state proceedings afford an adequate opportunity to raise the constitutional claims. See id. at 425, 430.

A. Adjudicatory and Review Hearing Pursuant to the Pennsylvania Juvenile Act Constitute "Ongoing Judicial Proceedings."

The case sub judice makes out a stronger argument for abstention than does Moore v. Sims on this point, because in the latter, the state forum had yet to reach substantive issues before the federal action was filed. Here, the federal filing followed preliminary and adjudicatory hearings in state court, and the federal action went forward while the

appellants were before the state forum litigating their visitation schedule. The Younger abstention has been crafted, in part, to avoid duplicative litigation and waste of judicial resources. See Younger, 402 U.S. at 44. See also Steffel v. Thompson, 415 U.S. 452, 462 (1974).

The entire statutory scheme of the Pennsylvania legislation reflects a strong policy in favor of continuing juvenile court jurisdiction over the child and his family so that the court can do what is necessary to further the child's welfare and lessen and, hopefully, improve the dysfunctional familial issues which brought the child into care in the first place. See 42 Pa. Cons. Stat. Ann. Section 6351; In Re

Black, 273 Pa. Super. 536, 417 A.2d 1178 (1980).

Moore v. Sims explicated three distinct considerations that counsel abstention when broad based challenges are made to state policy. See Moore, 442 U.S. at 428. The first was a concern regarding when the state statute has yet to be interpreted by the state court, a constitutional determination predicated upon the federal court's interpretation of that statute risked being merely advisory and possible discredited by later state court interpretations. (The "Pullman" concern). See id. (referring to Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941)). Here, no state court has reviewed the specific regulation to determine its application. Moreover, the federal complaint was not limited to a

facial attack on the regulation, but also sought relief for the regulation "as applied" by the county agency. Abstention is more appropriate when a challenge is made to a state statute as applied, rather than upon its face, since the reach of the uncertain state statute might, in that circumstance, be more susceptible of "a limiting or clarifying construction." Steffel v. Thompson, 415 U.S. at 474-475 n.21.

The second consideration is the need for concrete case or controversy. See Moore, 442 U.S. at 428-429. As discussed in part I of this cross-petition, it is incontrovertible that Petitioners cannot point to any present injury in fact. The Winstons on a regular basis returned to the state forum to improve their visitation privileges up to the point of

the return of the child. Accordingly, there was and continues to be no injury in fact to sustain a federal court review seeking declaratory and injunctive relief.

The last concern is prompted by the doctrine of comity: broad facial attacks on state statutes in federal court pose "needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes." Moore, 442 U.S. at 428 (citation omitted). As this Court said:

> When federal courts disrupt that process of mediation while interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals.

Id. at 429. See also Trainor v. Hernandez, 431 U.S. 434, 445 (1977).

Here, if a state-wide established policy of supervised visitation is to give way, the principal expositor of the new policy should be the state court who is wholly competent to adjudicate federal constitutional claims. See Huffman v. Pursue, Ltd., 420 U.S. 592, 610-611 (1975).

B. Regulating the Care, Custody and Control of Children Properly Adjudicated Dependent and Placed in Foster Care is an Important State Interest.

The gravamen of the state's interest in the state pending proceeding is the second element of analysis under Younger. "Family relations are a traditional area of state concern." Moore, 442 U.S. at 435. The importance of a state's interest in domestic relations matters is reflected in early Supreme Court precedent dealing with the jurisdiction

of federal district courts. See In Re Burrus, 136 U.S. 586 (1890). In In Re Burrus, the Court said:

> The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States. As to the right to control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction.

Id. at 593.

The Moore Court stated that it was "unwilling to conclude that state processes are unequal to the task of accommodating the various interests and deciding the constitutional questions that may arise in child welfare litigation." Moore, 442 U.S. at 435. Accordingly, federal courts ordinarily

should defer to the state courts based upon the state's strong interest in domestic relation matters, the superior expertise of state courts in settling such disputes and the possibility of incompatible state and federal orders. See id.

The several Circuit Courts of Appeal to address this issue have found that a state's compelling interest in protecting the welfare of children warrants federal court abstention. See Fay v. South Colonie Central School Dist., 802 F.2d 21, 31 (2d Cir. 1986); Brunken v. Lance, 807 F.2d 1325 (7th Cir. 1986); Malachowski v. City of Keene, 787 F.2d 704 (1st Cir.), cert. denied, 479 U.S. 828 (1986); DeSpain v. Johnston, 731 F.2d 1171 (5th Cir. 1984); Peterson v. Babbitt, 708 F.2d 465, 466 (9th Cir.

1983). Because of this authority, many of the district courts have stayed their hand in similar cases. Christopher B. v. Barry, 715 F. Supp. 1143 (D.D.C. 1989); Donker v. City of NY Human Resources Admin., 673 F. Supp. 1221 (S.D.N.Y. 1987); P. Edward A. by and through Nolan v. Williams, 696 F. Supp. 1432 (D.Utah 1988); Williams v. Carros, 576 F. Supp. 545 (W.D. Pa. 1983).

C. The Delaware County Juvenile Court Provided an Appropriate Forum to Adequately Address the Alleged Violation of Federal Rights.

State courts share with federal courts the "solemn responsibility . . . to safeguard constitutional rights." Trainor v. Hernandez, 431 U.S. at 443 (quoting Steffel v. Thompson, 415 U.S. at 460-461.)

Federal courts have often recognized the obligation and competence of state courts to decide federal constitutional questions. See Texaco v. Pennzoil Co., 784 F.2d 1133, 1142 (2d Cir. 1986). The burden rests upon the appellants "to show that the state procedural law barred presentation of their claims." Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987). The pertinent decision is whether constitutional claims could have been raised in the pending state proceedings, not whether a decision would have been rendered in a timely fashion. See Moore, 422 U.S. at 425, 432.

The Winston's failure to avail themselves of the state court to contest the constitutionality of CYS's visitation policy should not give them access to federal courts to obtain declaratory and

injunctive relief. See id. at 430 n.12 (quoting Juidice v. Vail, 430 U.S. 327 (1977)); DeSpain v. Johnson, 731 F.2d at 1179.

D. The Lower Court Erred in Holding that Cross-petitioners Waived their Right to Assert Abstention.

Cross-petitioners asserted federal court abstention as an affirmative defense in their Answer. Thus, CYS did not waive its right to assert abstention in the District Court. Although the district court rejected the assertion of abstention, the district court found in favor of CYS on the merits of the case.

The Winston's appealed the District Court's decision. Cross-petitioners did not cross-appeal on the issue of abstention. However, no cross-appeal was necessary because CYS, having prevailed in the district court despite the court's

rejection of its assertion of abstention, was seeking neither to increase its rights nor decrease the rights of the Winstons. As Justice Brandeis wrote for the Court in United States v. American Railway Express Co., 265 U.S. 225 (1924):

> [A] party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. **But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.**

Id. at 435 (emphasis added).

Furthermore, the Third Circuit has stated that failure to file a cross-appeal will not preclude their consideration of particular issues. See Scott v. Univ. of Delaware, 601 F.2d 76, 82 n.12, 82-83 (3d Cir. 1979); Rhoads v. Ford Motor Co., 514 F.2d 931, 934 (3d Cir. 1975). "[T]he power of the court of appeals should be plenary to the extent that it chooses to exercise it. A court should not close its eyes to what is plainly there." Rhoads, 514 F.2d at 934 (quoting McCreary Tire & Rubber Co. v. CEAT S.P.A., 501 F.2d 1032, 1038 (3d Cir. 1974)). See also Charles A. Wright, Arthur R. Miller, Edward H. Cooper, Federal Practice and Procedure § 3904 (1992).

However, it is apparent that Cross-petitioners did not fail to raise the

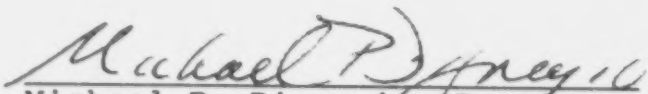
abstention issue on appeal. In response to a request from the Third Circuit dated March 20, 1991, all parties briefed the issues of mootness and abstention in briefs dated March 27, 1991. It is inconsistent that the Third Circuit requested and received briefs on abstention and then in its decision held that Cross-petitioners waived their right to assert this issue.

Cross-petitioners request this Court to grant this Writ to uniformly establish that the state court is the appropriate forum to address constitutional challenges to child welfare agencies' policies and procedures affecting children under agency supervision. See Moore, 442 U.S. at 435.

CONCLUSION

For the reasons detailed above, Cross-Petitioners respectfully request this Court to grant this Cross-Petition for Writ of Certiorari.

Respectfully submitted,



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Supreme Court, U.S.
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No. 91-1669
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

SAMUEL WINSTON, JR., a minor by his parents, MARYANNE AND SAMUEL WINSTON, SR. and MARYANNE WINSTON and SAMUEL WINSTON, SR.,
Petitioners and Cross-Respondents

v.

CHILDREN AND YOUTH SERVICES OF DELAWARE COUNTY, H. SCOTT CAMPBELL, SANDRA CORNELIUS, COUNTY OF DELAWARE and JOHN F. WHITE, JR..
Respondents and Cross-Petitioners

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF CROSS-RESPONDENTS IN OPPOSITION TO THE CROSS-PETITION FOR WRIT OF CERTIORARI

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May 13, 1992

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioners' claims challenging the constitutionality of a child welfare agency's visitation policy are moot due to the return of the minor child to the custody of his parent, or whether the case falls within the "capable of repetition, yet evading review" exception to the mootness doctrine.

2. Whether Cross-Petitioners have waived the defense of abstention and, if not, whether the doctrine, as enunciated in Younger v. Harris, 401 U.S. 37 (1971), is applicable in this instance.

TABLE OF CONTENTS

Page

Questions Presented for Review.....i

Table of Contents.....ii

Table of Authorities.....iii

Statement of the Case.....1

Reasons for Denying the Writ.....3

I. Petitioners' claims should not be dismissed as moot, because they are "capable of repetition yet evading review".....4

II. Cross-Petitioners have waived the defense of abstention. Even if the doctrine is not waived, the Federal Court should not abstain in this instance.....6

Conclusion.....9

TABLE OF AUTHORITIES

CASES Page(s)

Brown v. Hotel Employees, 468 U.S. 491 (1984).....7

Coleman v. Stanziani, 570 F. Supp. 679 (E.D. Pa. 1983).....8

Fawber v. Cohen, 532 A.2d 429 (Pa. 1987).....8

Honig v. Doe, 484 U.S. 305 (1988).....4,5

McLaughlin v. Pernsley, 876 F.2d 308 (3rd Cir. 1989).....7

Norman v. Joseph, 739 F. Supp. 1182 (N.D. Ill. 1990).....8

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911).....4

Wisniewski v. Johns-Mansville Corp., 812 F.2d 81 (3d Cir. 1987).....7

Younger v. Harris, 401 U.S. 37 (1971).....i,6

STATUTES AND REGULATIONS

Fed. R. App. P. 28 (a)(4).....7

STATEMENT OF THE CASE

Petitioners request this Court to refer to their Petition for Writ of Certiorari for a "Statement of the Case." Petitioners also wish to supplement that Statement to provide information particularly relevant to the issues of mootness and abstention raised in the instant Cross-Petition.

In their Answer to Petitioners' initial Complaint filed in the Eastern District Court of Pennsylvania, the County Defendants (Cross-Petitioners herein) first raised the issues of mootness and abstention as affirmative defenses. These Defendants later filed a Motion to Dismiss on the mootness issue, arguing that the return of the minor to his father on December 20, 1989 rendered Petitioners' claim moot. Abstention was not raised as an issue in that or any other motion. The Motion to Dismiss (for mootness) was denied by the District Court, and the trial proceeded

on the merits. By Order and Memorandum entered on September 25, 1990, the District Court ruled in favor of Defendants on the merits.

On October 24, 1990, Petitioners filed an appeal to the United States Court of Appeals for the Third Circuit. There was no cross-appeal. All parties submitted briefs to the Court. Cross-Petitioners did not raise the issues of mootness or abstention in their brief. Subsequent to the filing of these briefs, the Third Circuit requested supplemental briefs on these two procedural issues. On November 7, 1991, the Court of Appeals held that Petitioners' claims were not moot and that Cross-Petitioners had waived the defense of abstention. The Court proceeded to affirm the District Court's decision on the merits.

On November 21, 1991, Petitioners petitioned for a panel rehearing. On December 3, 1991, this petition was denied by the Court

of Appeals. On March 2, 1992, Petitioners filed a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, which was resubmitted pursuant to Court instructions, by letter dated April 3, 1992. On April 3, 1992, Cross-Petitioners filed the instant Writ of Certiorari, which was resubmitted pursuant to Court instructions, by letter dated April 13, 1992.

REASONS FOR DENYING THE WRIT

In their Cross-Petition for Writ of Certiorari, Cross-Petitioners raise the issues of mootness and abstention, both of which were addressed at length by the Court of Appeals. This Court should deny Cross-Petitioners' Writ, because the Third Circuit correctly analyzed both of these issues as a preliminary matter prior to reaching the merits of the appeal.

I. PETITIONERS' CLAIMS SHOULD NOT BE DISMISSED AS MOOT, BECAUSE THEY ARE "CAPABLE OF REPETITION YET EVADING REVIEW."

Cross-Petitioners argue that the Court of Appeals should have dismissed Petitioners' claim because the visitation practices of the child welfare agency (CYS) were rendered moot by the return of the minor child to the custody of his father. This Court should deny Cross-Petitioners' Writ because the Third Circuit correctly applied the exception to the mootness doctrine by determining that the controversy was "capable of repetition, yet evading review." See Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911).

In Honig v. Doe, 484 U.S. 305 (1988), this Court determined that part of the test to overcome mootness was "...whether the controversy was capable of repetition and not, ...whether the claimant had demonstrated that a recurrence of the dispute was more probable

than not." Honig, supra at 602, n.6. The Third Circuit in the case below correctly recognized that there was a reasonable possibility that the type of parental conduct that brought the minor into the protective custody of CYS in the first place would recur. (App. 8a).

The Third Circuit also recognized that the issue of CYS's visitation policy could evade review because of the short-term nature of foster care. (App. 9a). As noted by the Court, there were no statistics or other information of record in the case to demonstrate that other children have remained in foster care for a period of time long enough to effectively pursue a legal challenge to the CYS visitation policy. (App. 9a).

Because the Third Circuit correctly applied the exception to the mootness doctrine, this Court should deny Cross-Petitioners' Writ on that issue.

II. CROSS-PETITIONERS HAVE WAIVED THE DEFENSE OF ABSTENTION. EVEN IF THE DOCTRINE IS NOT WAIVED, THE FEDERAL COURT SHOULD NOT ABSTAIN IN THIS INSTANCE.

Cross-Petitioners argue that, pursuant to the Younger doctrine, the District Court should have abstained from hearing Petitioners' claims. The Third Circuit correctly determined that Cross-Petitioners had failed to preserve any claim for abstention. For that reason and because abstention is not appropriate, this Court should deny Cross-Petitioners' Writ on that issue.

As the Third Circuit stated, Cross-Petitioners waived the abstention issue at the Circuit Court level by not appealing from the District Court's failure to abstain, by failing to cross-appeal when Petitioners appealed from the adverse judgment, and by failing to

initially brief the issue.[1] See discussion at App. 10a-12a and Rule 28 (a)(4) of the Federal Rules of Appellate Procedure. Also see Brown v. Hotel Employees, 468 U.S. 491 (1984); McLaughlin v. Pernsley, 876 F.2d 308 (3d Cir. 1989) and Wisniewski v. Johns-Mansville Corp., 812 F.2d 81 (3d Cir. 1987). Because Cross-Petitioners waived the abstention defense at the Circuit Court level, there is no reason for this Court to address the issue.

In dicta, the Court of Appeals did discuss the merits of abstaining. The Court correctly determined that abstention was not appropriate, because the applicable state procedures did not afford the Petitioners the opportunity to raise all of their claims in the underlying state

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[1] The issue of abstention came before the Third Circuit only at the request of the Court itself. However, the Court's request that the parties file supplemental briefs on the issue did not overcome Cross-Petitioners' failure to preserve the defense. (See App. 12a).

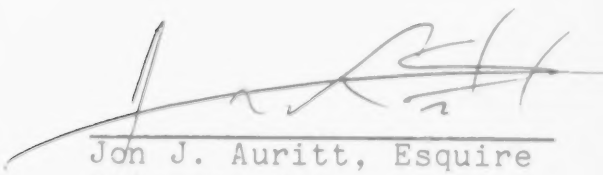
proceeding. See discussion at App. 13a-14a and Fawber v. Cohen, 532 A.2d 429 (Pa. 1987). Also see Norman v. Joseph, 739 F. Supp. 1182 (N.D. Ill. 1990) and Coleman v. Stanziani, 570 F. Supp. 679 (E.D. Pa. 1983).

Because Cross-Petitioners waived the issue and because abstention is not appropriate, this Court should deny Cross-Petitioners' Writ on that issue.

CONCLUSION

For the reasons detailed above, Cross-Petitioners' Writ of Certiorari should be denied.

Respectfully submitted,



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